

South Palm Beach County Bar Association
Bankruptcy Committee
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Exemptions Issues in Bankruptcy

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Understanding Entireties Exemptions: Planas and its Progeny

6 Characteristics of Tenancy by the Entireties

- unity of possession (joint ownership and control);
 - (2) unity of interest (the interests in the account must be identical);
 - (3) unity of title (the interests must have originated in the same instrument);
 - (4) unity of time (the interests must have commenced simultaneously);
 - (5) survivorship; and
 - (6) unity of marriage (the parties must be married at the time the property became titled in their joint names).
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- **Planas v. Feltman, 1998 WL 757988 (S.D. Fla.)**
 - Reversed bankruptcy court's legal conclusion that a married couple's single joint debt could be used by the trustee to destroy the debtor spouse's exemption as to all TBE property.
 - Only debts to joint creditors can be satisfied from entireties property.
 - Where real property is acquired specifically in the name of husband and wife, a tenancy by the entireties is created.

Real Estate/ Bank Accounts

• **Beal Bank, SSB v. Almand And Associates, 780 So.2d 45 (Fla.2001)**

- The ownership of real property in the name of both spouses vests title in them as tenants by the entireties.
- The intent to hold real property as a tenancy by the entireties is presumed.
- A presumption in favor of a tenancy by the entireties can arise when a married couple jointly owns personal property such as a bank account.
- As between the debtor and a third-party creditor (other than the financial institution into which the deposits have been made), if a signature card for a bank account does not expressly disclaim a tenancy by the entireties form of ownership, a rebuttable presumption arises that a tenancy by the entireties exists provided that the account is established by husband and wife in accordance with the unities of possession, interest, title, and time and with right of survivorship.
- The conjunction "or" rather than "and" on spouses' signature cards for bank accounts was not

dispositive of the type of account, that is, a tenancy by the entireties or a joint tenancy. An express designation on the signature card that the account is held as a tenancy by the entireties ends the inquiry as to the form of ownership.

Motor Vehicles

Beal Bank Presumption Extends to All Personal Property

In re Daniels, 309 B.R. 54 (Bankr. M.D. Fla 2004)

- Motor vehicle which was titled in name of Chapter 7 debtor "or" his nondebtor-spouse was owned by them as joint tenants and not as tenants by the entirety, regardless of their intent, and was subject to administration by trustee.
- Motor vehicle that was titled neither in name of Chapter 7 debtor "or" his nondebtor-spouse nor in names of debtor "and" his nondebtor-spouse, but in both of their names with each name **separated by a hyphen**, was presumptively held as tenants by the entirety, such that, in absence of any contrary evidence, vehicle was not subject to administration by trustee in bankruptcy case in which there were no joint creditors.
- Beal Bank presumption can and should extend to include all marital personal property, not just financial accounts.

Stock Certificates

Cacciatore v. Fisherman's Wharf Realty Limited Partnership, 821 So.2d 1251 (Fla. 4th DCA 2002)

- Beal Bank presumption should be extended to create a presumption of tenancy by the entireties in a stock certificate.
- Stock certificate titled in the name of both husband and wife, which meets the 6 unities of tenancy by the entireties, is presumed to be tenancy by the entireties property and the burden shifts to the creditor to prove that the stock was not held as tenancy by the entireties.
- For the presumption of a tenancy by the entireties to arise in connection with ownership of a stock certificate issued in the joint names of a husband and wife, the words "with right of survivorship" are not required to be appended.

Proceeds From Sale of TBE Property

Passalino v. Protective Group Securities, Inc., 2004 WL 2534222 (Fla.App. 4 Dist.)

- The proceeds from the sale or rental of tenancy by the entireties property are also held as a tenancy by the entireties and are owned in total by both the husband and the wife.
- A tenancy by the entireties can be terminated by the divorce of the owners, the death of one of the owners, or an agreement between the owners.
- Transferring the proceeds of the sale of entireties property to a trustee for the benefit of the

husband and wife does not terminate the unities of title or possession, where the parties clearly intended their property to be held as a tenancy by the entireties by exercising beneficial ownership of the property and controlling the property's disposition.

Beal Bank Presumption Extends to All Personal Property

In re Kossow 325 B.R. 478 (Bankr. S.D.Fla. 2005)

- Presumption that married couple holds property as tenants by the entireties extends to all of their personal property, other than joint bank accounts.

Joint Debt of Spouses

In re Monzon, 214 B.R. 38 (Bankr. S.D. Fla. 1997)

- Entireties property is not exempt from process to satisfy joint debts of both spouses.
- While bankruptcy trustee could administer entireties property to extent of Chapter 7 debtor's and nondebtor spouse's joint debt, any excess proceeds from property's liquidation remained exempt from process under Florida law and exempt from trustee's reach.

Hidden Homestead Issues

Mobile and Motor Homes

Florida Statute 222.05. Setting apart leasehold

- Any person owning and occupying any dwelling house, including a mobile home used as a residence, or modular home, on land not his or her own which he or she may lawfully possess, by lease or otherwise, and claiming such house, mobile home, or modular home as his or her homestead, shall be entitled to the exemption of such house, mobile home, or modular home from levy and sale as aforesaid.

In re Yettaw, 2004 WL 2480196 (Bankr. M.D. Fla.)

- Debtor's motor home was a "dwelling house" entitled to the homestead exemption.
- Florida Legislature expanded definition of "dwelling house" to exempt mobile and modular homes held by a debtor where the debtor merely leases the land.
- Under Florida law, the criteria for determining whether the public policy of homestead exemption shall apply to an "unconventional" or "nontraditional" abode include, but are not limited to: (1) debtor's intent to make the nontraditional abode his homestead, (2) whether debtor has no other residence, (3) whether the evidence establishes a continuous habitation, (4) whether debtor maintains at least a possessory right associated with the land establishing a physical presence, (5) whether the nontraditional abode has been physically maintained to allow long-term habitation versus mobility, and (6) whether the physical configuration of the abode permits habitation; otherwise, the physical characteristics are immaterial.

- **In re Kirby, 223 B.R.825 (Bankr. M.D. Fla. 1998)**
 - In addition to requiring that debtor intends to use property as permanent residence, Florida's constitutional homestead provision requires that there be attachment to fixed and permanent property interest in Florida, even for nontraditional mobile properties.
 - Florida statute, which extended homestead exemption protection to mobile homes located on leaseholds, did not abrogate requirement that property claimed as homestead be connected with land within geographic confines of Florida.
- **Meadow Gorves Management, Inc. v. McKnight, 689 So.2d 315 (Fla. 5th DCA 1997)**
 - Mobile home park tenant's homestead exemption in mobile home was extinguished when county court determined that owner of park was entitled to possession of lot where mobile home was situated, due to tenant's nonpayment of rent; from that date, tenant was no longer in lawful possession of lot on which mobile home was resting.

Boats

- **In re Mead, 255 B.R. 80 (Bankr. S.D. Fla.2000)**
 - Chapter 7 debtor's 34-foot cabin cruiser, which was berthed at a leased boat dock, was exempt homestead property under Florida law; debtor intended to, and actually did, live on the boat with his family, boat was debtor's only residence, boat was registered in Florida and permanently docked in that state, and so boat qualified as a dwelling house connected to land not his own that debtor lawfully possessed.
 - Leased dockage space for Chapter 7 debtor's boat satisfied requirement of Florida homestead exemption statute that dwelling house be "on land not his or her own which he or she may lawfully possess"; similar to lot on which mobile home is parked, boat dock was an integral part of maintaining residence on a boat, providing both access and necessary utility connections.
- **In re Brissont, 250 B.R. 413 (Bankr. M.D. Fla. 2000)**
 - Under Florida law, 37-foot motorboat that was not manufactured as dwelling place, and which debtors did not purchase for that purpose, was not legally capable of exemption as homestead property, even assuming that debtor-husband, following institution of divorce proceedings by debtor-wife, had taken up residence therein.
 - The Cabin Cruiser was designed exclusively for use as marine transportation.
- **In re Hacker, 260 B.R. 542 (Bankr. M.D. Fla.2000)**
 - Florida statute providing that an unorthodox residence may qualify for a homestead exemption under certain circumstances was not meant to be limited to mobile homes and modular homes.
 - Debtor's "motor boat" was a moveable chattel, not a residence, and so could not support a homestead exemption under Florida law; debtor's boat was designed, manufactured, and, until recently, used exclusively as marine transportation rather than as a dwelling place, boat

could navigate on its own power if debtor could afford to repair its engines, and debtor only towed boat to its "permanent" home at a boat yard because its engines failed while navigating.

• **In re Walter, 230 B.R. 200 (Bankr. S.D. Fla. 1999)**

- The motor vessel in this case, which is a navigable vehicle with Canadian registration, is not the type of property the legislature sought to protect as a homestead. It would be an unwarranted extension of the homestead protection afforded by the Florida Constitution to protect the instant vessel, which is designed to serve as a recreational vehicle rather than a permanent dwelling.

Residency/Domicile

• **11 USC §522 Exemptions**

- (b) . . . an individual debtor may exempt from property of the estate . . . (2)(A) any property that is exempt under . . . State or local law that is applicable on the date of the filing of the petition at the place in which the *debtor's domicile has been located for the 180 days immediately preceding the date of the filing of the petition, or for a longer portion of such 180-day period than in any other place* . . . (emphasis added)

• **In re Lordy, 214 B.R. 650 (Bankr. S.D. 1997)**

- To determine whether Chapter 7 debtors could claim property as exempt under Florida law, on theory that they had moved from New Jersey to Florida prior to commencement of their bankruptcy case, and that Florida was the state in which they were domiciled for the greatest portion of the 180 days immediately preceding their bankruptcy filing, bankruptcy court had to determine whether debtors were Florida domiciliaries on or before the 91st day prior to petition date.
- Change in domicile, of kind which may enable debtor to claim property as exempt under the law of state to which he or she has relocated, requires physical presence at new location along with an intention to remain there indefinitely, or absence of any intention to go elsewhere.
- Among factors bearing on debtor's domicile, for purposes of bankruptcy exemption provision, are debtor's current residence, debtor's voting registration and practices, location of debtor's spouse and family, location of debtor's personal and real property, location of debtor's brokerage and bank accounts, debtor's memberships in churches, clubs and other organizations, location of debtor's doctors, dentist, accountant and lawyers, place of debtor's employment or business, debtor's driver's license and automobile registration, and debtor's payment of taxes.

Size Limits

• **Florida Constitution Article X, Section 4, Homestead; exemptions**

- (a) There shall be exempt from forced sale . . . (1) a homestead, if located outside a

municipality, to the extent of one hundred sixty acres of contiguous land . . . or if located within a municipality, to the extent of one-half acre of contiguous land . . .

Pre Petition Judgment Liens on Homestead

- Judge Friedman no longer grants motions to avoid judicial liens on homestead property. See In re Cannon, 254 B.R. 773 (S.D. Fla. 2000) and In re: Epstein, Case No. 02-35334 BKC SHF. Accordingly, in lieu of filing a motion to avoid a judicial lien, practitioners should file a motion for an order determining that the property is homestead and that the judgment does not attach as a lien.

The Trustee's Partition Powers

11 USC § 363

- (h) . . . the trustee may sell both the estate's interest . . . and the interest of any co-owner in property in which the debtor had, at the time of the commencement of the case, an undivided interest as a tenant in common, joint tenant, or tenant by the entirety, only if– (1) partition in kind of such property among the estate and such co-owners is impracticable;(2) sale of the estate's undivided interest in such property would realize significantly less for the estate than sale of such property free of the interests of such co-owners;(3) the benefit to the estate of a sale of such property free of the interests of co-owners outweighs the detriment, if any, to such co-owners; and(4) such property is not used in the production, transmission, or distribution, for sale, of electric energy or of natural or synthetic gas for heat, light, or power.

Wage Accounts

- Fla. Stat. § 222.11: Exemption of Wages from Garnishment for Head of Household. Pursuant to Florida law, earnings of a head of household cannot be garnished, unless the debtor earns more than \$500.00 per week and the debtor has agreed to the garnishment in writing. A person is the “head of household” if the provide more than 50 percent of the support of a minor child or other dependant. “Earnings” include compensation paid or payable for personal services or labor...whether denominated as wages, salary, commission, or bonus. However, the earnings of individuals that are self employed and/or are independent contractors are generally not considered as earnings under the statute.
- **NON Head of Household**: §222.11(2)(c) disposable earnings of a person other than head of family may not be attached or garnished in excess of amount allowed under 15 U.S.C. § 1673 (Consumer Credit Protection Act)
- **Six Months Of Earnings Are Exempt**: Earnings that are exempt for a head of household or non-head of household which are deposited into a bank account are exempt for 6 months after the earnings are received by the bank. The funds must be traced and properly identified as earnings. However, the commingling of earnings with other funds does not by itself prevent the ability of the debtor to trace the earnings. In re Weinshank, 406 B.R. 413, (Bankr. S.D. Fla., 2009)

Limitation of Exemption of Certain Retirement Accounts (can exempt up to \$1 million)

- In general, the funds in individual retirement accounts (IRA) are exempt only up to \$1,095,000 in aggregate value without regard to the amounts attributable to rollover contributions. This section specifically does not apply to a simplified employee pension or a simple retirement account under section 408(p) of the Internal Revenue Code.
- The amounts may be increased if the interests of justice so require.

Engaging in Prohibited Transactions:

- If a debtor engages in prohibited transactions with respect to his retirement accounts, the exemption may be lost. See *In Re: Willis* 2009 WL 2424548 (2009)

Inherited IRAs are NOT exempt:

- Robertson v. Deeb, 2009 WL 2476529
- Case strictly construed the statute § 222.21(a) and found that the IRA was exempt against creditors of the owners of it during their lifetime but not as to the heir or beneficiary who inherits it.

Enhanced Personal Property Exemption if No Homestead Exemption:

- In Re Abbott, 408 B.R. 903 (Bkrtcy.S.D.Fla.,2009).
- A debtor who does not receive the benefits of the homestead exemption is entitled to \$4000.00 personal property exemption.
- Court concludes that the Debtors, who did not claim the homestead exemption in their bankruptcy schedules, who owed more on their home than it was worth on the Petition Date, and who were not shielding their home from the reach of creditors by some other device, did not receive the benefits of the homestead exemption as of the Petition Date even though they continue to reside in the Real Property and they intend to reaffirm the debt secured by the Real Property. Therefore, the Debtors are eligible to claim the Statutory Personal Property Exemption
- In Re Kent, 2009 WL 2837427 (Bkrtcy. M.D. Fla. 2009).
- Debtor generally may claim personal property up to the value of \$4,000.00 as exempt pursuant to Florida's enhanced personal property exemption, unless the debtor either "claims" a homestead exemption or "receives the benefits of" a homestead exemption. West's F.S.A. Const. Art. 10, § 4; West's F.S.A. § 222.25(4).
- Fla. §222.25(4)
- Exclusion from eligibility for Florida's enhanced, wildcard personal property exemption, for any debtor who "claim[s] or receive[s] the benefits of a homestead exemption," applies only to debtors who actually receive, and not all those who are eligible to receive, benefits of homestead exemption; mere eligibility for homestead exemption, as result of owning home that meets the constitutional definition of homestead, does not disqualify debtor from claiming enhanced personal property exemption. West's F.S.A. § 222.25(4).

Special Rules of Application of Exempt Property in Individual Chapter 11 Cases:

- In individual Chapter 11 cases, a debtor may not keep their non-exempt property unless all unsecured creditors that will receive less than full payment vote in favor of the Chapter 11 Plan. This provision is commonly referred to as the "absolute priority rule." Bankr.Code, 11 U.S.C.A. § 1129(b)(2)(B)(ii). See In re Gosman, 282 B.R. 45 (Bankr. S.D. Fla. 2002).